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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

KRIS EURE, Plaintiff and Appellant, v. STEVE AMSTER, Defendant and Appellant.	E039070 (Super.Ct.No. RIC365916) OPINION

APPEAL from the Superior Court of Riverside County. Annette M. Yettke, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Ezer, Williamson & Brown, LLP and Mitchel J. Ezer, for Defendant and Appellant Steve Amster.

Law Offices of Kenneth Lance Haddix and Kenneth Lance Haddix, for Plaintiff and Appellant, Kris Eure.

INTRODUCTION

On June 1, 2005, the trial court granted plaintiff Kris Eure's motion for a new trial. Defendant Steve Amster appeals from a portion of the trial court's subsequent order which was entered on July 28, 2005. Specifically, he appeals a determination that service in the action was impossible, impracticable or futile from and after October 2, 2002. (Code Civ. Proc.,[1] § 583.240.)

Plaintiff Eure cross-appeals from the trial court's order of February 28, 2005. That order granted defendant Amster's motion to dismiss the present action as to Amster.[2]

FACTUAL AND PROCEDURAL HISTORY

On October 22, 2001, Kris Eure (plaintiff) filed a complaint for wrongful foreclosure and seven related causes of action against a number of defendants, including "Steve Amsterdam, an individual."[3]

A first amended complaint, filed May 21, 2002, added as a defendant, "Steve Amster aka Steve Amsterdan, an individual" in the caption. The first amended complaint alleged that Steve Amsterdam is an individual engaged in the business of buying real

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[1] All further statutory references will be to the Code of Civil Procedure unless otherwise indicated.

[2] As discussed below, the cross-appeal is moot.

[3] Pages 3 and 5 of the complaint, which apparently contain an allegation of the capacity of defendant Amsterdam, are missing from our record.

property at trustee's sales. There are no capacity or charging allegations against "Steve Amster aka Steve Amsterdan."

A second amended complaint was filed in August 2002. It drops the reference to Steve Amster and continues to name "Steve Amsterdam." The same is true of the third amended complaint, filed in October 2002.

The history of plaintiff's attempts to serve Mr. Amster is lengthy and convoluted. After the first amended complaint was filed, plaintiff filed a motion to serve "Steve Amster aka Steve Amsterdam" by publication in the Riverside Business Journal. The court granted the motion on May 28, 2002. The notice, which was published in June 2002, designated Mr. Amster as Doe 1.

Subsequently, on October 2, 2002, the court found that "Steve Ansterdam" was deemed served by publication, and the default of Steve Amster was entered. However, as noted above, the third amended complaint was filed in late October 2002.

In December 2003, Mr. Amster filed a motion to quash service. The motion stated a number of grounds for challenging the validity of service on Mr. Amster. In an accompanying declaration, Mr. Amster states that he had been a resident of Las Vegas, Nevada, since the action was filed in October 2001, except for a four-month period when he lived in Parker, Arizona. He learned of the action in August 2003, after his attorney in an unrelated action learned of this action by coincidence. The attorney filed a declaration describing the coincidence.

The motion to quash was heard on January 27 and March 2, 2004. The court ruled that the default had to be set aside before the motion to quash could be granted. The

order was filed July 9, 2004. A petition for writ of mandate was denied (E036374) and a petition for review was denied by the Supreme Court on October 13, 2004.

In November 2004, Mr. Amster filed a motion to vacate the default, quash service, and dismiss the action as to him. The motion was heard on January 12, 2005. The court granted all requested relief. The order, which was filed February 28, 2005, is the subject of plaintiff's cross-appeal. However, plaintiff now concedes her cross-appeal is moot.

Plaintiff subsequently filed a motion for new trial to challenge the granting of the dismissal order. Plaintiff argued that plaintiff still had two years to serve Mr. Amster because the three-year period for service was only tolled for less than a year while the motion to quash was pending.

The new trial motion was heard on June 1, 2005. The court vacated the dismissal of the action as to Mr. Amster, but the orders vacating the default and quashing service were reaffirmed. The court found that the dismissal was erroneous because it had failed to consider tolling issues when it made its February 28, 2005, ruling. The court then considered tolling issues and found that, under section 583.240, "there should be excluded any period during which the validity of service was the subject of litigation by the parties (subd. (c)) and any period during which service was 'impossible, impracticable, or futile' (subd. (d))."

The court found that all the time between December 15, 2003, to October 13, 2004, and from November 9, 2004, through February 28, 2005, had to be excluded under subsection (c) because the validity of service was being litigated during this time. In

addition, "The court also finds that service was impossible, impracticable, or futile from and after October 2, 2002." This decision is the subject of Mr. Amster's appeal.

Since the court found these tolling provisions applicable, it concluded that the three-year period of section 583.250 had not yet run, and the prior dismissal, in the February 28, 2005, order was therefore improper. Consequently, the court granted plaintiff's motion for a new trial, but it also found that all appearances by Mr. Amster had been special appearances, and that Mr. Amster had never made a general appearance in the action. Both parties appeal.

DISCUSSION

Section 583.210 provides that the summons and complaint must be served within three years from the commencement of the action. Section 583.240 provides that the time period must be calculated by excluding the time in which the validity of service was the subject of litigation by the parties or "[s]ervice, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control."

As noted above, the trial court found that validity of service was the subject of litigation from December 15, 2003, through October 13, 2004, and from November 9, 2004, through February 28, 2005.

Mr. Amster does not contest this ruling and excludes those periods from his own computation of time. Under his argument, if the periods in which service was litigated are excluded, the three-year period expired on December 8, 2005. He therefore asks us to order the trial court to dismiss the action.

The trial court also found that "service was impossible, impracticable, or futile from and after October 2, 2002." The trial court accepted plaintiff's argument that plaintiff relied on the court's finding, made on October 2, 2002, that "Steve Ansterdam" was served by publication at that time. Plaintiff's counsel argued, "from the plaintiff's perspective, armed with a finding that service has been deemed accomplished, it's futile, impracticable and impossible to serve it again." Plaintiff's counsel also thought there would be some risk of a harassment claim if plaintiff sought to reserve defendant after obtaining a court ruling that he had been served by publication.

Mr. Amster argues that the trial court erred because service was not impossible, impracticable or futile. First, he argues the order was void for a number of reasons, including the misnomer. But that argument misses the point: although the order was wrong, and was subsequently set aside, the plaintiff had a ruling that a misnamed defendant had been served by publication. Although there may be an issue as to whether the plaintiff's reliance on the order was reasonable, given the misnomer, the order was at least facially valid until set aside. (See generally 4 Witkin, Cal. Procedure (4th Ed. 1996) Pleading, § 438, pp. 530-531.)

Second, Mr. Amster argues that there was no impossibility, impracticability or futility as a matter of law. He argues that the standard must be strictly construed against plaintiff, and refers only to circumstances beyond plaintiff's control. He cites *Bishop v. Silva* (1991) 234 Cal.App.3d 1317, 1321-1322, and *Scarzella v. Demers* (1993) 17 Cal.App.4th 1762, 1770. He emphasizes that the failure to properly serve him sprang from causes within the control of plaintiff's former attorney.

In response to this argument, plaintiff argues that even if the trial court erred in finding impossibility, impracticability, or futility, and tolled the three-year statute only while the service issue was litigated, the time for service, by defendant's own calculations, would not have expired until December 8, 2005. Since this date is long after the June 1, 2005, hearing date, plaintiff argues that the trial court was clearly correct in deciding that the dismissal of the action at the January 12, 2005, hearing was improper. Since the ruling appealed from is unchallenged, plaintiff argues that it should be affirmed.

We agree with plaintiff. Our review is limited to the validity of the portion of the order being appealed. In this case the portion being appealed is the July 28, 2005, finding that service was impossible, impracticable or futile after October 2, 2002. We have no information about events after July 28, 2005, including, for example, whether there was service or any further tolling of the three-year statute for any reason.[4] Since defendant Amster agrees that there was time available for service after July 28, 2005, he must agree that the trial court correctly vacated the February 28, 2005, dismissal order.

One issue remains. Plaintiff seeks review of the trial court's determination that defendant did not make a general appearance on October 13, 2004.[5] Although plaintiff

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[4] As a result, we cannot agree to defendant's request that we order the trial court to dismiss the action for failure to serve defendant within three years, i.e., by December 8, 2005.

[5] October 13, 2004, is the date the Supreme Court denied defendant's petition for review. Plaintiff's argument on the general appearance issue relies on section 418.10.

did not appeal that order, plaintiff argues that it is reviewable under section 906. That section provides, in relevant part: "[T]he reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party, including, on any appeal from the judgment, any order on motion for a new trial . . . . *The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken.* The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken."[6] (Italics added.)

We first note that the final sentence is applicable because plaintiff could have appealed the portion of the trial court's July 28, 2005, order which concluded that defendant had never made a general appearance in the action, but plaintiff did not do so.

Plaintiff relies on the second, italicized, sentence of the statute and argues that the sentence authorizes us to consider this issue on this appeal even though plaintiff did not appeal it. Plaintiff reasons: "If Defendant was 'deemed to have made a general appearance' on October 13, 2004, as Plaintiff argued in the motion for new trial, Plaintiff is not required to serve process on Defendant, so Defendant suffered no prejudice from

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[6] An order granting a new trial is appealable under section 904.1, subdivision (a)(4).

any error in the court's ruling about periods that should have been excluded in determining Plaintiff's deadline for completing service."

However, defendant Amster points out, and we agree, that he only appealed the portion of the July 28, 2005, order which finds that service was impossible, impracticable, or futile. Obviously, defendant prevailed on the no-general-appearance finding, and Mr. Amster certainly did not appeal it. Thus, the situation does not fit the statutory language because the no-general-appearance ruling is not a ruling which defendant relied on for reversal of the judgment.

The no-general-appearance ruling is also not a ruling which can be reviewed to determine if defendant was prejudiced by the finding that service was impossible, impracticable, or futile. The only prejudice which would be suffered by defendant would occur if the no-general-appearance ruling was reversed. The no-general-appearance ruling has nothing to do with the question of whether defendant was prejudiced by the court's finding that service was impossible, impracticable or futile. Although that finding did prejudice defendant by excluding a large block of time from the calculation of the three-year period to serve the summons and complaint, the prejudice is different from the prejudice which would flow from reversal of the no-general-appearance finding. As the statute states, the requisite test is whether appellant, i.e. defendant Amster, was prejudiced by the error he relies on for reversal.

We therefore find that plaintiff cannot successfully rely on the second sentence of section 906 to obtain review of the no-general-appearance finding: "[I]t is the settled rule that a party may appeal from *part of a severable judgment*. The effect of the appeal is

that only the part appealed from is brought up for review. The rest of the judgment becomes final, the appellate court has no jurisdiction to review it, and an order of reversal, though general in terms, will be construed to apply only to the part appealed from. [Citations.]" (9 Witkin, Cal. Procedure (4th Ed. 1996) Appeal, § 202, p. 255.) We therefore decline to address the merits of the no-general-appearance issue.

DISPOSITION

The order of July 28, 2005, granting a new trial is affirmed. The cross-appeal of plaintiff is dismissed as moot. Each party to bear their own costs on appeal.

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/s/ RAMIREZ
P.J.

We concur:

/s/ McKINSTER
J.

/s/ GAUT
J.